

**ATTORNEY GENERAL’S SUPPLEMENTAL STATEMENT OF LEGAL AUTHORITY
FOR MAINE’S NATIONAL POLLUTION DISCHARGE ELIMINATION SYSTEM
(NPDES)**

1. Injunctive Relief.

State law provides authority for injunctive relief prior to an actual violation occurring, and for any unauthorized activity which is endangering or causing damage to public health or the environment.

FEDERAL AUTHORITY: CWA §§ 309(b), 504; 40 C.F.R. 123.27(a)(1) and (2).

STATE’S STATUTORY AND REGULATORY AUTHORITY: 38 M.R.S.A. § 348 (1) and (3); and Maine Rules of Civil Procedure, Rule 65 (a) and (b).

REMARKS OF THE ATTORNEY GENERAL:

Similar to § 309(b) of the Clean Water Act, State law authorizes commencement of a civil action, including injunctive proceedings to enjoin violation of any provision of a law administered by the Maine Department of Environmental Protection (MDEP).¹ It is the general rule under Maine law that injunctive relief may be sought to prevent a threatened or prospective violation. *Jones v. Dearborn*, 146 Me. 257, 258 (1951). Pursuant to Maine Rules of Civil Procedure, Rule 65, injunctive relief may include temporary restraining orders and, under some circumstances, temporary restraining orders may be issued without notice. Moreover, where an injunction is authorized by a statute designed to provide a government agency with the means to enforce public policy, no balancing of equities is necessary. *State v. Sirois*, 478 A.2d 1117,

¹ Section 309(b) of the Clean Water Act states, in pertinent part, that, “the Administrator is authorized to commence a civil action for appropriate legal relief, including a permanent or temporary injunction, *for any violation* for which he is authorized to issue a compliance order . . . ”

Similarly, 38 M.R.S.A. § 348(1) states that, “ in the event of *a violation* of any provision of the laws administered by the Department or of any order, regulation, license, permit, approval or a decision of the Board or Commissioner or decree of the Court, . . . the Attorney General may institute injunctive proceedings to enjoin *any further violation thereof* . . . ”

1121-22 (Me. 1984). Thus, to obtain injunctive relief under the State's environmental statutes, the Attorney General need only establish that there is a likelihood of success on the merits and that the public interest will not be adversely affected by the granting of the requested relief. *Id.*; *Ingraham v. University of Maine in Orono*, 441 A.2d 691, 693 (Me. 1980). Threatened violations, violations which have occurred, violations which are ongoing and violations which are endangering or causing damage to public health or the environment are all subject to equitable relief under Maine law.

2. Schedules Of Compliance.

State law authorizes establishing schedules of compliance for effluent limitations based on water quality standards only where those schedules are consistent with the requirements of the Clean Water Act.

FEDERAL AUTHORITY: CWA §§ 301(b), 303(e), 304(b), 306, 307, 402(b)(1)(A), 502(11) and 502(17); 40 C.F.R. 122.47 and 122.62.

STATE STATUTORY AND REGULATORY AUTHORITY: 38 M.R.S.A. §§ 414-A (2) and (3), and 464 (5) and (6); 06-096 CMR Chps. 522 (13) and 523 (7).

REMARKS OF THE ATTORNEY GENERAL:

Under 38 M.R.S.A. § 414-A (2), the State may issue permits with schedules of compliance for final effluent limitations based upon water quality standards adopted after July 1, 1977. Read in context with all the State's water quality laws and the Clean Water Act, this provision is not intended to authorize compliance schedules if pre-existing water quality standards are repromulgated or if they are made less stringent. Rather, this provision gives the DEP the discretion to allow initial compliance schedules when new or more stringent water quality standards are adopted after July 1, 1977. Title 38, § 414-A (3), makes clear that the

intention of the Legislature was that the DEP operate the waste discharge licensing program in full compliance with the requirements of the Clean Water Act. This includes complying with all Clean Water Act limitations on the use of compliance schedules as set forth in *In Re Star-Kist Caribe, Inc.*, NPDES Appeal No. 88-5 (1990).

Similarly, the provisions of 38 M.R.S.A. § 464 (6) must be read in conjunction with all the State's water quality laws.² Section 464 (5) directs the DEP to develop regulations to implement the State's water quality standards. To the extent that these regulations result in new or more stringent standards, schedules of compliance would be permitted. Section 464 (6) (A) and (B) authorize State permits to contain "reasonable schedules" during the period prior to the issuance of final regulations. Section 464 (6) must, however, be read in context with § 414-A (2) and (3). Thus, "reasonable schedules" of compliance under § 464 (6) should not be construed as requiring, or authorizing, compliance schedules in permits to meet existing narrative requirements, unless there is a new or more stringent interpretation of those requirements. A compliance schedule under § 464 (6) would not be "reasonable", or authorized, unless it was in conformance with the Legislature's clear intent that any waste discharge permit issued by the State fully comply with Clean Water Act requirements, including the limitations on the use of compliance schedules. 38 M.R.S.A. § 414-A (3); *In Re Star-Kist Caribe, Inc.*, *supra*.

² 38 M.R.S.A. § 464 (6) provides, in pertinent part, that

[a]t any time during the term of a valid wastewater discharge license that was issued prior to the effective date of this article, the board may modify that license in accordance with section 341-D, subsection 3 if the discharger is not in compliance with the water quality criteria pertaining to the protection of the resident biological community. When a discharge license is modified under this subsection, the board shall establish a reasonable schedule to bring the discharge into compliance with the water quality criteria pertaining to the protection of the resident biological community. When a discharge license is issued after the effective date of this article and before the effective date of the rules adopted pursuant to subsection 5, the department shall establish a reasonable schedule to bring the discharge into compliance with the water quality criteria pertaining to the protection of the resident biological community.

3. Concentrated Aquatic Animal Production Facilities And Aquaculture Projects.

Under State law, concentrated aquatic animal production facilities and aquaculture projects are subject to the State's waste discharge permitting program in accordance with 40 C.F.R. 122.24 and 122.25.³

FEDERAL AUTHORITY: CWA § 301(a), 402(a), and 402(b)(1)(A); 40 C.F.R. 122.24 and 122.25.

STATE STATUTORY AND REGULATORY AUTHORITY: 38 M.R.S.A. §§ 361-A (1), (4-A), (5) and (7), 413, 414, 414-A and 464 (4).

REMARKS OF THE ATTORNEY GENERAL:

Until the State receives authority to grant permits under the Clean Water Act, a person is in compliance with the State's waste discharge license laws if a discharge resulting from an aquaculture operation, associated with off-shore marine aquaculture operations, has been certified by the DEP as an aquaculture activity that will not have a significant adverse effect on water quality or violate the water quality classifications of the receiving water, and a leasehold has been obtained from the Department of Marine Resources. Under this statutory scheme, the Department of Environmental Protection, alone, determines whether water quality standards are being met, and the Department of Marine Resources cannot issue a leasehold for an aquaculture operation unless the DEP certifies that water quality standards will be maintained. 38 M.R.S.A. § 413 (2-F).

³ Although not defined under Title 38, "marine aquaculture projects" have historically included facilities that are federally defined as "concentrated aquatic animal production facilities" under 40 CFR 122.24, as well as those defined as "aquaculture projects" under 40 CFR 122.25. For purposes of issuing waste discharge permits under the federally approved program, the DEP will be required to regulate so-called "fish farms" utilizing the federal definitions. Thus, fish farms heretofore considered "aquaculture projects" under State law, but meeting the federal definition of "concentrated aquatic animal production facilities," will need to be regulated as federally defined

Once the State receives authority to grant permits under the Clean Water Act, aquaculture operations in estuarine and marine waters will no longer be subject to § 413 (2-F) and will, therefore, require a license under 38 M.R.S.A. § 413. Similarly, federally defined “concentrated aquatic animal production facilities,” even if presently referred to as “marine aquaculture projects” under State law, will require a license under § 413. A prerequisite to any waste discharge permit is that the discharge meet all the State’s water quality laws. 38 M.R.S.A. § 413 (1) and (2-F); 414-A (1) and (3); and 464 (4).

Upon federal program approval, in order to receive a waste discharge permit from the DEP, federally defined aquaculture projects and concentrated aquatic animal production facilities will still need to obtain a leasehold from the Department of Marine Resources (“DMR”), and manage and monitor the project/facility in accordance with the schedule approved by DMR. However, DEP will assume and retain full authority to administer the waste discharge license program under 38 M.R.S.A. § 413. This includes the authority to add management and monitoring requirements which go beyond those imposed by DMR, if necessary to maintain and protect water quality standards, or meet other applicable, CWA requirements. 38 M.R.S.A. § 413 (10) (B), (D) and (E). In addition, information obtained by the DEP in the administration of the waste discharge licensing program will be available to the public as set forth in 38 M.R.S.A. § 414 (6).

“concentrated aquatic animal production facilities” in order to comply with state and federal law. See 38 M.R.S.A. §§ 413 (1) and (10), and 414-A (3).

4. Permit Appeals.

For purposes of judicial appeals of licensing decisions by interested parties, Maine law is at least as broad as federal law. See Attorney General's Statement dated November 2, 1999, pages 29-31.

FEDERAL AUTHORITY: 40 C.F.R. 123.30.

STATE STATUTORY AND REGULATORY AUTHORITY: 5 M.R.S.A. §§ 8003 and 1101; 38 M.R.S.A. § 346(1); 06-096 CMR Chp. 2 §§ 1 (B) and 21 (D); Maine Rules of Civil Procedure, Rule 80C.

REMARKS OF ATTORNEY GENERAL:

Under State law, pursuant to 5 M.R.S.A. § 11001 and 38 M.R.S.A. § 346 (1), any aggrieved party is entitled to judicial review of a final agency action. Persons who may be considered "aggrieved" for purposes of permit appeals are those who meet the test set forth in *Fitzgerald v. Baxter State Park Authority*, 385 A.2d 189 (Me. 1978). See Attorney General's Statement dated November 2, 1999, page 30. Any more restrictive standard for who may appeal a final agency action must be expressly authorized by statute. 5 M.R.S.A. § 8003.

To the extent that it constitutes a departure from the broad appellate rights under the Maine APA, 38 M.R.S.A. §346 (3) at most may be seen as providing a very narrow exception restricting a riparian or littoral owner's causes of action against a licensee, licensed under § 414 to discharge into State waters, and is not intended to impede the ability of an otherwise aggrieved party, as defined in *Fitzgerald*, to appeal a permit under 5 M.R.S.A. § 11001, 38 M.R.S.A. § 346 (1), or 06-096 CMR Chp. 2 §§ 1 (B) or 21 (D).⁴ Upon its enactment, § 346 (3) was intended to

⁴ 38 M.R.S.A. § 346 (3) states, "[n]o riparian or littoral owner on any body of water shall have a cause of action either at law or in equity against any licensee licensed under section 414 to discharge into the same body of water nor be deemed an aggrieved person under this section based on the fact that such licensee is not a riparian or littoral

provide a narrow degree of protection for a licensee from actions by certain neighboring property owners if the licensee complied with the terms of its waste discharge license, and did not cause or contribute to the lowering of any water classification, or cause actual damages to any riparian or littoral owner.⁵

Moreover, 5 M.R.S.A. § 8003 requires that, *except where explicitly authorized by statute*, existing or subsequently adopted statutory provisions which are inconsistent with express conditions of the APA must “yield and the applicable provisions of [the APA] shall govern in its stead.” The provisions of 38 M.R.S.A. § 346 (3), which may be seen as narrowly limiting a riparian or littoral owner’s causes of action against a licensee, do not clearly constitute an explicit statutory authorization pre-empting the APA’s express right for aggrieved parties to appeal final agency actions. Accordingly, for purposes of who may be considered “aggrieved” in permit appeals, it is the view of this office that § 346 (3) should be read as yielding to the Maine APA’s broad statutory right in regard to the judicial appeal of a final licensing decision. See, also, Attorney General’s Statement dated November 2, 1999, pages 29-31.

owner on such body of water. No such owner shall have a cause of action either at law or in equity against such licensee nor be deemed an aggrieved person under this section based on the fact that such licensed discharge will prevent the owner from having the reasonable use and enjoyment of such body of water, provided that such licensed discharge will not either of itself or in combination with existing discharges to the body of water lower the statutory classification of such body of water, nor cause actual damages to such owner.”

⁵ At the time § 346 (3) was enacted, State law did not contain a “permit shield” provision like that set forth in § 402 (k) of the CWA, which provides that compliance with a permit “shall be deemed compliance” with the Act. In 1998, the Maine Legislature enacted § 414 (8) which parallels § 402 (k) of the CWA. Thus, the narrow protection provided under § 346 (3) to licensees in compliance with the terms of their discharge licenses was expanded by the Legislature so that it is now comparable to the “permit shield” under the CWA. 38 M.R.S.A. § 414 (8).

5. Mixing Zones.

State law does not automatically allow for mixing zones for dilution of pollutants in all situations.

STATE STATUTORY AND REGULATORY AUTHORITY: 38 M.R.S.A. §§ 348, 349, 413, 414, 414-A (1), 414-B, 451, 464 (4) (A), (D) and (F).

REMARKS OF ATTORNEY GENERAL:

Pursuant to 38 M.R.S.A. §§ 348 and 349, the State may enforce the terms of permits issued by the Department. As confirmed in the Attorney General's Statement, dated November 2, 1999, pp. 9-10, the State may require compliance with permit limits at the end of the discharge pipe when necessary to enforce water quality standards. 38 M.R.S.A. §§ 414-A (1), 464 (4) (A), (D) and (F). State law further provides that it is unlawful to dispose of pollutants so as to lower the quality of waters below the minimum requirements of their classification, notwithstanding compliance with any licenses issued under §§ 413, 414, 414-A and 414-B. See 38 M.R.S.A. § 451. In such circumstances, compliance with State water quality standards is determined "after reasonable opportunity for dilution." *Id.* In any enforcement matter brought for permit violations, however, compliance would be assured by enforcing the terms of the permit.⁶ In an enforcement action to establish a permit violation, no allowance would need to be made for dilution. Rather, dilution would be taken into account, to the extent allowed, only when initially setting the terms of a permit.

⁶ In addition, the DEP may not issue a waste discharge permit for discharges "for which the imposition of conditions cannot ensure compliance with applicable water quality requirements..." 38 M.R.S.A. § 464 (4) (A) (8).

6. Protection of Threatened and Endangered Species.

The DEP has the necessary authority to protect threatened and endangered species in accordance with the requirements of the Clean Water Act.

FEDERAL AUTHORITY: CWA §§ 101 (a) (2), 301, 402 (d) (2); 40 C.F.R. 122.44 (d), 123.44. 124.10 (c) (1) (i) and (e), 124.59, 131.3 (e) and 131.12.

STATE STATUTORY AND REGULATORY AUTHORITY: 38 M.R.S.A. §§ 413, 414, 414-A, 420, 464 (4) (F), 465, 465-A, and 465-B ; 06-096 CMR Chp. 523.5 (d), 523.10.

REMARKS OF ATTORNEY GENERAL:

Any person that discharges a pollutant into waters of the State must obtain a license, prior to commencing the discharge. 38 M.R.S.A. § 413. All waste discharge licenses must contain limitations reflecting the federally required application of treatment technologies, as well as any necessary, more stringent limitations required to ensure compliance with water quality standards. 38 M.R.S.A. § 414-A, 420, 464 (4).

As required by the CWA, State water quality standards consist of two components: (1) the designated uses of waters, which include use for public water supplies, habitat for fish and other aquatic life, recreational, industrial and/or other uses; and (2) water quality criteria, consisting of numeric and narrative criteria, which represent the quality of water that supports a particular use. 38 M.R.S.A. §§ 465, 465-A, and 465-B; *Bangor Hydro-Electric v BEP*, 595 A.2d 438, 442 (Me. 1991). In addition, the State's antidegradation policy protects existing uses, and maintains and protects the highest water quality being achieved. 38 M.R.S.A. § 464 (4) (F).⁷

⁷ Pursuant to 38 M.R.S.A. § 464 (4) (F),
[t]he antidegradation policy of the State is governed by the following provisions.

(1) Existing in-stream water uses and the level of water quality necessary to protect those existing uses must be maintained and protected. Existing in-stream water uses are those uses which have actually occurred on or after November 28, 1975, in or on a water body whether or not the uses are included in the standard for classification of the particular water body.

Determinations of what constitutes an existing in-stream water use on a particular water body must be made on a case-by-case basis by the department. In making its determination of uses to be protected and maintained, the department shall consider designated uses for that water body and:

- (a) Aquatic, estuarine and marine life present in the water body;
- (b) Wildlife that utilize the water body;
- (c) Habitat, including significant wetlands, within a water body supporting existing populations of wildlife or aquatic, estuarine or marine life, or plant life that is maintained by the water body;
- (d) The use of the water body for recreation in or on the water, fishing, water supply, or commercial activity that depends directly on the preservation of an existing level of water quality. Use of the water body to receive or transport waste water discharges is not considered an existing use for purposes of this antidegradation policy; and
- (e) Any other evidence that, for divisions (a), (b) and (c), demonstrates their ecological significance because of their role or importance in the functioning of the ecosystem or their rarity and, for division (d), demonstrates its historical or social significance.

(1-A) The department may only issue a waste discharge license pursuant to section 414-A, or approve a water quality certification pursuant to the United States Clean Water Act, Section 401, Public Law 92-500, as amended, when the department finds that:

- (a) The existing in-stream use involves use of the water body by a population of plant life, wildlife, or aquatic, estuarine or marine life, or as aquatic, estuarine, marine, wildlife, or plant habitat, and the applicant has demonstrated that the proposed activity would not have a significant impact on the existing use. For purpose of this division, significant impact means:
 - (i) Impairing the viability of the existing population, including significant impairment to growth and reproduction or an alteration of the habitat which impairs viability of the existing population; or
- (b) The existing in-stream use involves use of the water body for recreation in or on the water, fishing, water supply or commercial enterprises that depend directly on the preservation of an existing level of water quality and the applicant has demonstrated that the proposed activity would not result in significant degradation of the existing use.

The department shall determine what constitutes a population of a particular species based upon the degree of geographic and reproductive isolation from other individuals of the same species.

If the department fails to find that the conditions of this subparagraph are met, water quality certification, pursuant to the United States Clean Water Act, Section 401, Public Law 92-500, as amended, is denied.

(3) The department may only issue a discharge license pursuant to section 414-A or approve water quality certification pursuant to the Federal Water Pollution Control Act, Section 401, Public Law 92-500, as amended, if the standards of classification of the water body and the requirements of this paragraph are met. The department may issue a discharge license or approve water quality certification for a project affecting a water body in which the standards of classification are not met if the project does not cause or contribute to the failure of the water body to meet the standards of classification.

One of the mechanisms available for protecting threatened and endangered species is the State's antidegradation requirements, which require that existing in-stream water uses and the level of water quality necessary to protect those uses be maintained and protected. Existing in-stream water uses are defined as those uses which have actually occurred on or after November 28, 1975, in or on a water body, whether or not the uses are included in the standard for classification of the particular water body. *Id.*; 40 CFR 131.3 (e), and 131.12 (a) (1). The determination of what constitutes an existing in-stream use on a particular water body must be made on a case-by-case basis by the DEP. 38 M.R.S.A. § 464 (4) (F) (1). In making this decision, the DEP must consider the designated uses for the particular water body, and whether the proposed activity has a significant impact on: (1) aquatic, estuarine and marine life present in the water body; (2) wildlife that utilize the water body; (3) habitat within a water body that support existing populations of wildlife or aquatic, estuarine or marine life, or plant life; (4) actual uses that depend directly on the preservation of an existing level of water quality; and (5) the existing uses' role or importance in the functioning of the ecosystem, or their rarity. *Id.* In addition, the DEP must determine what constitutes a population of a particular species based upon, *inter alia*, the degree of geographic or reproductive isolation from other individuals of the same species. 38 M.R.S.A. § 464 (4) (F) (1-A) (b). The DEP may only issue a waste discharge license pursuant to § 414-A if it finds that the applicant has demonstrated that the proposed activity would not have a significant impact on the existing use. 38 M.R.S.A. § 464 (4) (F) (1-A) (a).

Thus, as required by the CWA, the State's antidegradation law provides the DEP with sufficient authority to protect, on a case-by-case basis, aquatic, estuarine and marine life, wildlife that utilize waters of the State, habitat, including significant wetlands, and plant life that is

maintained by a particular water body. 38 M.R.S.A. § 464 (4) (F) (1) and (1-A). In doing so, the DEP must use factors such as the degree of geographic and reproductive isolation of a particular species, and determine that the proposed activity will not “impair[] the viability of the existing population, including significant impairment to growth and reproduction or an alteration of the habitat which impairs viability of the existing population.” 38 M.R.S.A. § 464 (4) (F) (1-A).

CERTIFICATION OF LEGAL AUTHORITY

I HEREBY CERTIFY, pursuant to Section 402(b) of the Federal Water Pollution Control Act, as amended (33 U.S.C. § 1251, et seq.), that the laws of the State of Maine provide adequate authority, as set forth herein and in the Statement of Legal Authority dated November 2, 1999, to carry out the programs set forth in the "Program Description" submitted by the Maine Department of Environmental Protection. The specific authorities provided are contained in lawfully enacted or promulgated statutes, or in regulations that are in full force and effect or become effective upon approval by EPA of the State's NPDES and/or Pretreatment Programs.

Dated at Augusta, Kennebec County, Maine this day of May, 2000.

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